

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35271

JODY CARR,)	2009 Unpublished Opinion No. 658
)	
Petitioner-Appellant,)	Filed: October 28, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. Randy J. Stoker, District Judge.

Order dismissing application for post-conviction relief, affirmed.

Nevin, Benjamin, McKay & Bartlett, LLP, Boise, for appellant. Robyn A. Fyffe argued.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent. Jessica M. Lorello argued.

MELANSON, Judge

Jody Carr appeals from the district court's order summarily dismissing his application for post-conviction relief. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

According to the state's evidence presented at Carr's criminal trial, Carr met S.B. at a bar and the two drove to a secluded location to engage in intercourse. When S.B. exited to the front of the vehicle, Carr ran over her twice. Carr believed S.B. was dead and left the scene. Carr returned the next morning to make sure he did not leave any evidence and ran over S.B.'s body a third time to make sure she was not still alive. Carr fled to California with his family and was later arrested and returned to Idaho. Carr pled guilty to first degree murder. I.C. §§ 18-4001, 18-4002, 18-4003. The district court sentenced Carr to a unified term of life imprisonment, with a

minimum period of confinement of twenty-five years. This Court affirmed Carr's sentence in an unpublished opinion. *State v. Carr*, Docket No. 32555 (Ct. App. Oct. 25, 2006).

Carr filed a pro se application for post-conviction relief alleging that the conditions of his pretrial confinement rendered his guilty plea involuntary, that the police destroyed potentially exculpatory evidence, and that he received ineffective assistance of counsel. Carr also submitted an affidavit detailing his complaints. The district court appointed post-conviction counsel and gave notice of its intent to dismiss the application. Among other things, the district court reasoned that the claims relating to Carr's conditions of confinement would be more appropriately addressed through an action for habeas corpus relief and Carr's remaining claims did not raise genuine issues of material fact.

Carr filed an amended application, arguing that the conditions of his confinement affected the voluntariness of his guilty plea and that his other claims raised genuine issues of material fact which merited an evidentiary hearing. Carr filed an affidavit from his attorney relating the account of Carr's parents concerning their attempt to view or retrieve his vehicle with potentially exculpatory evidence inside only to be told that it had been destroyed. The district court gave a second notice of intent to dismiss because Carr failed to raise genuine issues of material fact, failed to support his claims with admissible evidence, several of his claims were clearly contradicted by his previous sworn testimony, and others were precluded because his case never went to trial.

Carr then filed another response with affidavits from himself and his stepfather. Carr's affidavit detailed evidence that was allegedly destroyed by police. It alleged that Carr's family provided a detective with a box of stolen valuables which the detective kept for himself. Carr alleged that these valuables were stolen by the man that he claimed committed the murder and would tend to prove his innocence. Additionally, it alleged that counsel failed to investigate the "correct" crime scene which would have had footprints, cigarette butts, and tire tracks tending to prove his innocence. Furthermore, Carr's affidavit alleged that the destroyed vehicle had methamphetamine pipes with fingerprints, beer cans, and a taped confession of the actual murderer, which would have proven his innocence. The affidavit of Carr's stepfather alleged that the detective told him that Carr's vehicle had been inspected and no evidence was retrieved

before it was destroyed. A new judge was assigned to the case and substitute counsel was appointed.¹ The district court summarily dismissed Carr's application. Carr appeals.

II.

ANALYSIS

Carr argues that the district court erred by summarily dismissing his application for post-conviction relief. He contends that he raised genuine issues of material fact that his guilty plea was coerced by the conditions of his pre-trial confinement; his due process rights were violated by the destruction of evidence; and that he received ineffective assistance of counsel for failing to file a motion to suppress, for failing to file a motion for change of venue, for failing to keep confidences, and that the jail interfered with his access to counsel and necessary legal materials.

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code Section 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the

¹ A new judge was assigned after the presiding judge passed away. Substitute counsel was appointed for Carr after his previous trial counsel was appointed as a magistrate.

applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993). In post-conviction actions, the district court, as the trier of fact, is not constrained to draw inferences in favor of the party opposing the motion for summary disposition; rather the district court is free to arrive at the most probable inferences to be drawn from uncontroverted evidence. *Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008).

1. Involuntary guilty plea

Carr claims that he raised a genuine issue of material fact that his guilty plea was involuntary due to the alleged conditions of his pretrial confinement. In Carr's lengthy affidavit he claims that he was starved, poisoned, denied medical treatment and clean clothing, intentionally left in the company of prisoners who assaulted him on numerous occasions, identified by jail guards to other prisoners as a rat and a rapist, held for extensive periods in lockdown with no recreational access, deprived of warm clothing and blankets and intentionally kept in a cold cell, subjected to bright lights and continuous noise, and forced to live in unsanitary conditions. Carr alleges that all of these conditions were an attempt by jail staff to coerce his guilty plea. He contends that he pled guilty for "the sole purpose of human survival" and so "the suffering would finally come to an end."

Carr's affidavit stands in stark contrast with his sworn testimony at the change of plea hearing. At that hearing, the district court conducted the following colloquy:

[COURT]: Have you taken any alcohol or drugs or other medication in the last 48 hours?

[CARR]: No, sir, I have not.

[COURT]: Is there or are you suffering from any mental or psychological problems that make it hard for you to understand these proceedings?

[CARR]: No, sir, I'm not.

[COURT]: Is there anything else going on in your life that affects your ability to make a reasoned and informed decision today?

[CARR]: No, sir.

....

[COURT]: Has anyone made any other promises or commitments to you that haven't been discussed on the record here today?

[CARR]: No, sir, they have not.

[COURT]: Has anyone told you that [the district court] will follow this plea agreement?

[CARR]: No, sir, they have not.

[COURT]: Has anyone told you that he would go easier on you for pleading guilty rather than exercising the right to go to trial?

[CARR]: No, sir, they have not.

[COURT]: Has anyone threatened you or anyone close to you in order to get you to enter a plea of guilty today?

[CARR]: No, sir.

[COURT]: Is your decision to plead guilty a voluntary decision?

[CARR]: Yes, sir, it is.

This Court has held that post-conviction allegations are insufficient for the granting of relief when they are clearly disproved by the record. *Cootz v. State*, 129 Idaho 360, 368, 924 P.2d 622, 630 (Ct. App. 1996). Because the allegations contained in Carr's affidavit were clearly contradicted by his sworn testimony given at the change of plea hearing, we conclude that they do not create a genuine issue of material fact meriting an evidentiary hearing.² Furthermore, not

² While we do not directly address this issue, we also note that in civil cases, while not precisely on point in the post-conviction context, Idaho Courts have disapproved of self-created issues of material fact through the use of affidavits directly contradicting prior sworn testimony. See *Frazier v. J.R. Simplot Co.*, 136 Idaho 100, 103, 29 P.3d 936, 939 (2001) (discussing the impermissibility of attempting to prevent an adverse summary judgment ruling by creating factual issues in an affidavit which contradicts prior sworn deposition statements); *Matter of Estate v. Keeven*, 126 Idaho 290, 298, 882 P.2d 457, 465 (Ct. App. 1994) (holding that a "sham" affidavit that directly contradicts previous testimony may be disregarded on a summary judgment motion). The Ninth Circuit also follows a general rule that a party cannot create an issue of fact by an affidavit contradicting his or her prior deposition testimony. See *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991). That court also held that allowing parties to raise

only were Carr's claims clearly contradicted by his prior sworn testimony, but there is a gaping evidentiary hole at the heart of Carr's contentions. Carr was incarcerated for sixteen months prior to the entry of his guilty plea. Other than the fantastical claims provided in his affidavit, Carr provided no admissible evidence documenting the alleged deplorable conditions in the form of prisoner complaints, medical records, or attorney communications. If Carr had been near death on several occasions, as he claims, there would at least be documentation of his treatment in the infirmary. However, Carr provided no such evidence with his application.

Carr argues that, while his sworn testimony may have some tendency to refute his claims, it is not conclusive because his responses did not directly address his detailed allegations of unlawful conditions of confinement. Carr's argument is unpersuasive. As quoted above, Carr's responses during the district court's colloquy at the change of plea hearing affirm that his plea was voluntary and not the product of threat or coercion. The district court was not required to ask specific questions concerning the conditions of Carr's pretrial confinement in order for his post-conviction claims to be clearly contradicted by his earlier sworn testimony. Were we to so conclude, every post-conviction applicant would be entitled to an evidentiary hearing on a claim that a guilty plea was coerced through unlawful conditions of pre-trial confinement based only on unsupported allegations contained in his or her affidavit. In this case, Carr's responses clearly show the absence of any threatening or coercive influence in his decision to plead guilty. Therefore, the district court did not err by summarily dismissing Carr's claim that his guilty plea was involuntary due to conditions of his pretrial confinement.

2. Destruction of evidence

Carr argues that the police violated his due process rights by destroying or concealing potentially exculpatory evidence. His application for post-conviction relief and supporting affidavits claimed that the man who Carr alleged committed the murder gave him a box of stolen jewelry and other valuables to remain quiet. Carr claimed that the box was delivered to a detective by his parents, but that the detective kept the box and never entered it into evidence. Carr also claimed that his vehicle contained exculpatory evidence in the form of

issues of fact simply by submitting an affidavit contradicting prior testimony would greatly diminish the utility of summary judgment proceedings. *Id.*

methamphetamine and beer cans with fingerprints of the victim and the man that Carr alleged committed the murder, as well as a taped confession of the actual murderer. Carr contends that his vehicle was crushed before it could be inspected by Carr's counsel and family members.

When analyzing a due process claim for destruction or nondisclosure of exculpatory evidence, Idaho courts have utilized a three-part test: (1) whether the evidence is material to the question of guilt or the degree of punishment; (2) whether the defendant was prejudiced by the loss or destruction of the evidence; (3) whether the government was acting in good faith when it destroyed or lost the evidence. *See Paradis v. State*, 110 Idaho 534, 540-41, 716 P.2d 1306, 1312-13 (1986). It is Carr's burden to provide admissible evidence supporting his allegations. Concerning the box of jewelry and other valuables, Carr contends that, because "the detective was provided the box and it was never seen from again . . . [there is] an inference that it was withheld from [Carr] in bad faith." That is the extent of Carr's argument that the police conduct relating to the disappearance of the alleged box of valuables was in bad faith. However, this argument is without merit. The mere absence of a piece of evidence does not raise an inference of bad faith. If so, the requirement of showing bad faith would be superfluous. Carr has failed to support this allegation with any admissible evidence. Therefore, the district court did not err by summarily dismissing this claim.

We next consider Carr's argument that his vehicle was destroyed with potentially exculpatory evidence inside. According to the affidavits attached to Carr's application, Carr's family members notified the detective of the alleged existence of exculpatory evidence inside the vehicle and the detective reported to them that he found no such evidence when he searched the vehicle. The family members then went to Jackpot, Nevada, to retrieve the vehicle and it could not be located. Later, Jackpot police notified the family that the vehicle had been taken to a towing and wrecking business in Idaho where it was crushed. Once again, Carr argues that the unexpected destruction of the vehicle raises an inference of bad faith on the part of the police investigating the crime. Other than this assertion, Carr offers no admissible evidence supporting his allegation that his vehicle was destroyed in bad faith. Therefore, the district court did not err by summarily dismissing this claim.

Furthermore, regarding both of Carr's claims of destruction of evidence, we are not persuaded that Carr did not waive these claims by pleading guilty. A valid guilty plea waives all nonjurisdictional defects and defenses, whether constitutional or statutory, in prior proceedings.

See Tollett v. Henderson, 411 U.S. 258, 267 (1973); *Heartfelt v. State*, 125 Idaho 424, 426, 871 P.2d 841, 843 (Ct. App. 1994). Carr’s application alleged a violation of his constitutional rights through the destruction of evidence by the state. This alleged claim was known at the time that Carr entered his guilty plea. Therefore, for this additional reason we conclude that the district court did not err by summarily dismissing this claim.

3. Ineffective assistance of trial counsel

Carr next alleges ineffective assistance of trial counsel for failing to file a motion to suppress, failing to file a motion for change of venue, failing to conduct an adequate investigation, failing to keep confidences, and jail interference with the assistance of counsel. A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney’s performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney’s representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). Where, as here, the defendant was convicted upon a guilty plea, to satisfy the prejudice element, the claimant must show that there is a reasonable probability that, but for counsel’s errors, he or she would not have pled guilty and would have insisted on going to trial. *Plant v. State*, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006). This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

First, we address Carr’s argument that trial counsel was ineffective for failing to file a motion to suppress. This issue was not addressed by the district court as it was not raised by Carr’s initial or amended application for post-conviction relief. Carr now argues that his application alleged that his confessions were coerced and that counsel was ineffective for “failing to file various motions.” Carr contends that this included failure to file a motion to suppress. Under this same reasoning, this broad claim could also include any theoretical motion that trial counsel failed to file. However, I.C. § 19-4903 requires that an application for post-

conviction relief shall “specifically set forth the grounds upon which the application is based, and clearly state the relief desired.” An application that alleges only that counsel was ineffective for failing to file various motions, does not meet that requirement of particularity. Therefore, we do not further address this issue.

Next, we consider Carr’s claim of ineffective assistance of trial counsel for failing to file a motion for change of venue. Carr’s application alleged his belief that a change of venue was essential because of a widespread conspiracy and connection among everyone in the locality where he was charged which denied him the opportunity of a fair trial. In a post-conviction proceeding challenging an attorney’s failure to pursue a motion in the underlying criminal action, the district court may consider the probability of success of the motion in question in determining whether the attorney’s inactivity constituted incompetent performance. *Boman v. State*, 129 Idaho 520, 526, 927 P.2d 910, 916 (Ct. App. 1996). Where the alleged deficiency is counsel’s failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test. *Id.*

A criminal defendant may seek a change of venue by statute or by rule of criminal procedure if he or she believes a fair and impartial trial cannot be had in the county where the indictment is pending. I.C. § 19-1801; I.C.R. 21; *State v. Sanger*, 108 Idaho 910, 911, 702 P.2d 1370, 1371 (Ct. App. 1985). The trial court can transfer the case to another county if satisfied that a fair and impartial trial cannot be had. *Sanger*, 108 Idaho at 911, 702 P.2d at 1371. This decision rests with the sound discretion of the trial court. *Id.* In this case, Carr provided no evidence to support his claim that the entire locality where he was being tried was connected in a conspiracy against him. We conclude that a motion for a change of venue would have had very little, if any, chance of success. Therefore, Carr has failed to show deficient performance or prejudice on this claim. Accordingly, the district court did not err by summarily dismissing this claim for failure to provide admissible evidence of deficient performance and prejudice.

Carr further alleges ineffective assistance of trial counsel for failing to adequately investigate what Carr alleged was the correct crime scene. Counsel in a criminal case has a duty to conduct adequate investigation. *State v. Mathews*, 133 Idaho 300, 307, 986 P.2d 323, 330 (1999); *Baker v. State*, 142 Idaho 411, 417, 128 P.3d 948, 954 (Ct. App. 2005). In any ineffectiveness case, a decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgment. *Strickland*,

466 U.S. at 691. What investigative decisions are reasonable depends on the defendant's strategic decisions and what information the defendant provides to his or her attorney. *Id.*

As noted above, this Court has previously held that post-conviction allegations are insufficient for the granting of relief when they are clearly disproved by the record. *Cootz*, 129 Idaho at 368, 924 P.2d at 630. At the change of plea hearing, Carr testified to the following:

[COURT]: Have you had adequate access to your lawyer to discuss the law and the facts of this case?

[CARR]: Completely.

....

[COURT]: Is there anything you've wanted your attorney to do or ask him to do to help you with your case that he hasn't done?

[CARR]: No, sir, not at all.

[COURT]: Are you satisfied with your attorney's representation?

[CARR]: Completely.

[COURT]: Have you gone over discovery with your attorney?

[CARR]: Yes, sir.

[COURT]: Did you understand what was discussed?

[CARR]: Yes, sir.

[COURT]: Do you request any additional discovery be done in your case?

[CARR]: No, sir, I do not.

Because the allegations contained in Carr's affidavit were clearly contradicted by his sworn testimony given at the change of plea hearing, we conclude that they did not merit an evidentiary hearing. Accordingly, the district court did not err by summarily dismissing this claim.

Carr also asserts ineffective assistance of trial counsel for failing to keep confidences. Carr's application and affidavit alleged that trial counsel disclosed to jail staff that he was providing information to authorities. Specifically, the affidavit provides: "Now [trial counsel] told [another person] and to the best of my knowledge [that other person] told [the jail sergeant] then [the jail sergeant] told some of the inmates in 100 block that I had been giving information to authoritys [sic]." Carr then claims that he was severely beaten due to counsel's alleged indiscretions. Carr's allegation constitutes, at least, hearsay upon hearsay upon hearsay, and falls woefully short of admissibility. Accordingly, Carr has failed to adequately support this claim with admissible evidence, and the district court did not err by summarily dismissing it.

Finally, Carr argues that he received ineffective assistance of counsel because the jail interfered with his access to counsel and legal materials and that counsel was ineffective for

allegedly doing nothing about it. Carr contends that, by monitoring his attorney-client conversations, the state denied him the constitutional right of effective assistance of counsel. In support of this claim, Carr cites to *Stuart v. State*, 118 Idaho 932, 801 P.2d 1283 (1990). However, in that case, the Idaho Supreme Court held that monitoring of confidential attorney-client communications *may* violate a defendant's constitutional right to the assistance of counsel. The facts of that case are substantially different than Carr's. Stuart filed an application for post-conviction relief alleging that confidential communications were monitored and that the state used those communications to obtain evidence that it otherwise would not have discovered. Notably, Stuart submitted numerous affidavits from jail staff and his attorneys substantiating his claims that his conversations were monitored and also disclosing the content of those conversations. *Id.* 118 Idaho at 933, 801 P.2d at 1284. Based on these facts, the Court distinguished Stuart's case from *State v. Martinez*, 102 Idaho 875, 643 P.2d 555 (Ct. App. 1982). *Stuart*, 118 Idaho at 933, 801 P.2d at 1284. In *Martinez*, this Court rejected a claim that jail monitoring interfered with the right to effective assistance of counsel because no evidence was provided documenting the substance of the recorded conversations. *Martinez*, 102 Idaho at 879, 643 P.2d at 559. This Court held that it would not assume the content of the discussions and that Martinez had failed in his burden of showing substantial prejudice as a result of the surveillance because none of the evidence so obtained was used against him at trial. *Id.*

In this case, Carr similarly has failed to raise a genuine issue of material of fact that he was prejudiced by the jail monitoring. He has failed to submit any admissible evidence substantiating his claims concerning jail monitoring of his legal correspondence and restricting access to legal materials. He has failed to submit any admissible evidence concerning the content of the conversations with his attorney. He has failed to submit any admissible evidence showing that he was prejudiced by the jail surveillance or trial counsel's alleged failure to do nothing about it. Accordingly, the district court did not err by summarily dismissing this claim.

III.

CONCLUSION

Carr's claim that his guilty plea was coerced through the allegedly deplorable conditions of his pretrial confinement are disproved by the record. Carr's claims concerning the destruction of evidence in the form of a box of valuables and his vehicle which allegedly contained exculpatory evidence are not supported by admissible evidence. Carr's application did not

specifically set forth a claim that counsel was ineffective for failing to file a motion to suppress. Carr's claims of ineffective assistance of counsel for failing to file a motion for change of venue, failing to adequately investigate the allegedly correct crime scene, and failing to keep confidences are not supported by admissible evidence. Carr's claims that the jail interfered with his right to the effective assistance of counsel by monitoring legal communications and limiting access to legal materials and that counsel was ineffective for allegedly failing to do anything about it also are not supported by admissible evidence. Therefore, the district court did not err by summarily dismissing these claims. Accordingly, the district court's summary dismissal of Carr's application for post-conviction relief is affirmed. No costs or attorney fees are awarded on appeal.

Chief Judge LANSING and Judge GUTIERREZ, **CONCUR.**